Supreme Court, U.S.
FILED
DEC 28 1992
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. 92-914

BETTY KASSULKE, et al.
Petitioners

V.

LAFONDA FAY FOSTER,
Respondent

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SUPREME COURT, U.S.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* *

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD SPEND PRECIOUS TIME MICRO-MANAGING THE LOWER FEDERAL COURTS WHO IN THIS CASE CAREFULLY CRAFTED RELIEF FOR UNNECESSARY INTERFERENCE WITH APPOINTED COUNSEL FOR A DEATH ROW INMATE WHEN THE RELIEF ITSELF IS NOW CONTINGENT ON FUTURE EVENTS?

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COUNTERSTATEMENT OF THE CASE

Respondent, Foster rejects the editorial comment in the petitioners' statement of the case. For example, when Ms. Foster was returned to Kentucky in 1989, she did not place any "extraordinary administrative burdens on Corrections..." [Petition for Writ of Certiorari, hereinafter Petition, 4]. No federal judge has agreed with this claim - unsupported by fact - yet petitioners continue to make it. Upon her return to Kentucky, this female death row inmate was simply "locked-down" with other female administrative segregation inmates in one wing of a male institution. There was nothing extraordinary or different about this in-state incarceration.

Corrections further claims that the initial preliminary injunction was issued "because of inadequate phone access to appointed counsel in Kentucky" [Petition for Writ of Certiorari, hereinafter Petition, 3-4]. The holding was not nearly so narrow.

> [I]t cannot be seriously argued that an 800-mile separation between plaintiff and her counsel is not an impediment to effective representation... Whether or not the transfer to Oklahoma was retaliatory, the result is that plaintiff is deprived of her right to consult with her attorney... [I]t is apparent that in plaintiff's case, her transfer to Oklahoma so interferes with her ability to communicate with her appellate counsel that *under these circumstances* it rises to the level of constitutional deprivation. Plaintiff has shown significantly more than mere inconvenience; her almost complete inability to communicate with her attorneys amounts to a denial of the right to counsel [Appendix to Petition, hereinafter Appendix, 20a].

The "access" problems identified by the court below could have been easily repaired - confidential telephone calls, a videotape machine and/or Kentucky law books, etc. Inexplicably, Corrections refused to lift a finger to influence any of Foster's conditions in

Oklahoma. It is the irrationality of Corrections' position, not any undue administrative burden on the state, that gives rise to this continued litigation.

By way of background, this Court must understand that Fay Foster was targeted for out-of-state transfer because of her sex even before she was sentenced to death and transferred from the local jail to the state prison in May, 1987. The lower court declined to reach this issue because it held the circumstances surrounding the transfer had denied respondent access to her counsel [Appendix 21a]. Foster's April 1991 motion for a permanent injunction again urged that her transfer to Oklahoma would interfere with her right to counsel, would be based on her sex and would constitute retaliation for her ongoing protests that her conditions of confinement were not comparable to those of death sentenced men[1] [Docket Entry 59]. In ordering Ms. Foster's return to Kentucky within forty-eight (48) hours of any denial of certiorari, the court specifically rejected respondent's retaliation claim, did not reach the claim that her transfer was based on her sex and accepted her argument that being lodged in Oklahoma would interfere with her access to the Kentucky courts once she is appointed new counsel and must file a post-conviction action [Appendix 12a-13a, 14a, 16a]. It was only from the last order that Corrections appealed. The district court's order required that she be transferred back to Kentucky only if her convictions were affirmed by the Supreme Court of Kentucky and certiorari was denied by the United States Supreme Court and only if...

> ...the Corrections Cabinet [refused] by contractual agreement with [Oklahoma] officials, [to] provide adequate... access to the courts of Kentucky.

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[1]This is the real genesis of this litigation.

[Appendix 12a].

In the interim, Foster won a new sentencing hearing in the Kentucky Supreme Court. Foster v. Commonwealth, Ky., 827 S.W.2d 670 (1991), cert. denied, _____ S.Ct. ____ (1992). Therefore, any further "imposition" on the state is speculative.

REASONS FOR DENYING CERTIORARI REVIEW

I. UNLESS RESPONDENT AGAIN RECEIVES A SENTENCE OF DEATH AFTER HER RESENTENCING, THIS WASTEFUL LITIGATION IS MUCH ADO ABOUT NOTHING.

While it is true that this action is not "moot" [Petition for Writ of Certiorari, hereinafter Petition at 3 n.2], and the Sixth Circuit agreed [Appendix to Petition, 2a n1, "This action does not moot the questions presented here."], any further impact of the lower court order is contingent on future events. As such, this case is a particularly inappropriate vehicle for addressing the routine, really mundane, access to courts issue present.

II. THIS COURT HAS BETTER THINGS TO DO THAN REHEAR THE FACTUAL DISPUTES FOUR FEDERAL JUDGES HAVE RESOLVED IN RESPONDENT'S FAVOR.

Inmates, including death row inmates, must be assured access to the courts that is "adequate, effective and meaningful..." Bounds v. Smith, 430 U.S. 817, 822 (1977). Obviously, appointment of counsel would satisfy the constitutional right to access to the courts...[2] *but not if the prison wouldn't let the lawyer in*. Despite the one-sided rendition of the facts by petitioners, key factual disputes relevant to the access issue were resolved in respondent's favor. The United States Supreme Court is not the proper forum to attempt relitigation of disputed facts.

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[2]The right at issue implicates more than one constitutional concern. Wolf v. McDonnell, 418 U.S. 539 (1974) [due process]; Procunier v. Martinez, 416 U.S. 396, 419 (1974) [due process]; Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) [equal protection]; Murray v. Giarratano, 492 U.S. 1, 7, 11 n.6 (1989) [equal protection]; Turner v. Safley, 482 U.S. 78, 84 (1987) [first amendment]; Hudson v. Palmer, 468 U.S. 517, 523 (1984) [first amendment].

Surely the "requirement of meaningful access can be satisfied in various ways" and "prison administration must be given 'wide discretion' to select appropriate solutions." Murray v. Giarratano, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring), quoting Bounds, 430 U.S. at 833. The problem here for petitioners is that they selected none of the available alternatives. It would have been a simple matter to provide Ms. Foster with confidential attorney calls, Kentucky law books[3], access to a videotape machine to review the record of her trial, etc. Corrections was not willing to do anything despite the grave penalty the condemned faced, the important and well established constitutional rights implicated and Corrections' own regulations. Corrections' intransigent position in this litigation has been inexplicable.

This case does not present any important or significant issue worthy of attention by this Court. The Kentucky-Oklahoma transfer resulted/would result in a denial of access to the courts because Ms. Foster's inability to communicate with (new) counsel, denial of confidential phone conversations, inability to review the record of her trial, the great distance between counsel and client and the absence of Kentucky law books in the Oklahoma institution all served to convince the lower courts to order Foster's return to Kentucky for limited periods of time to consult with her lawyers... *unless other steps were taken to permit access.*

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[3]However, "[w]here female prisoners lack their male counterparts' history of 'self help' in the law... equal protection considerations may require the library facilities be supplemental by assistance of a lawyer. Canterino v. Wilson, 546 F.Supp. 174, 216 (W.D. Ky. 1982), aff'd No. 86-6067, 1989 WL 40131, 1989 U.S. App. Lexis 4789 (6th Cir. April 10, 1989 [875 F.2d 862 (table)] unpublished), cert. denied, 493 U.S. 991... (1989)." Knop v. Johnson, 977 F.2d 996, 1003 n.4 (6th Cir. 1992).

The absurdity of petitioners' fallback position can be best seen in their (rejected) position that respondent can only be permitted to avail herself of Oklahoma courts (or the courts of any other jurisdiction to which she is sent) and not Kentucky courts to complain that she is denied access to her Kentucky counsel. Yet, if Foster cannot obtain adequate legal assistance of lawyers she already has, how then is she supposed to access the Oklahoma courts on this issue?[4]

Respondent agrees there is "no set formula" for providing adequate access to the courts, or in this case, counsel [Petition, 10]. Nor was one imposed below. In fact, the relief crafted by the district court permits Corrections to fashion any reasonable means to permit this death row inmate[5] access to her lawyers when she is in the hands of a foreign jurisdiction.

> The defendants have not carried their burden to prove that the resources available to Foster [in Oklahoma]... are adequate to ensure access to the Kentucky courts.... *[T]he Corrections Cabinet [may]... by contractual agreement with [Oklahoma] officials... provide adequately for Foster's access to the courts of Kentucky.*

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[4]Warden Ray of Oklahoma was unable to name any attorneys in Oklahoma to whom Fay Foster could turn if she had problems relating to communication with her Kentucky counsel or with conditions at the Oklahoma prison [Docket Entry 93]. Additionally, Warden Ray acknowledged he had no books on Kentucky law and no plans to get any. [Docket Entry 93].

[5]While the sentence a person receives is not dispositive of adequate access claims, it is not irrelevant, as Corrections claims, that respondant was under a sentence of death. See generally Murray v. Giarrantano, 492 U.S. 1 (1989). Death penalty cases are different, not because respondent says so, but because every member of the Supreme Court since Furman has so declared. As a form of punishment, death is qualitatively different from any other, calling for more meticulous procedures regarding critical legal issues.

[Appendix, 12a].

Corrections' claim that the lower court order requires Kentucky "oversight of the Oklahoma prison system..." is frivolous. It would be a simple matter to arrange for a videotape machine, confidential phone calls, Kentucky law books, etc., as part of the agreement with Oklahoma. Importantly, Kentucky law requires this. In criminal cases, the Sixth Amendment protects the attorney-client relationship from unwarranted intrusion. Wolff v. McDonnell, 418 U.S. 539, 576 (1974).

The Interstate Corrections Compact, codified in Kentucky as Ky. Rev. Stat. [KRS] 196.610, Article IV(e) provides as follows:

> The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

Under the Interstate Compact, the sending state continues to have jurisdiction over its inmates. KRS 196. 610, Article IV(c). Article IV(e) provides that confinement in a receiving state shall not deprive an inmate of any legal right he would have had if confined in the sending state; and, Article IV(h) provides that a transferred inmate "shall have any and all rights to participate in and derive any benefits... on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state." Certainly a federal court, which has jurisdiction over the Kentucky Corrections Cabinet, which has jurisdiction over the inmate facing transfer, had every right to order Corrections not to effectuate a transfer that would violate an inmate's

constitutional or statutory rights. By virtue of KRS 196.610, there is no competing state correctional interest here. See generally Rich v. Zitnay 644 F.2d 41 (1st Cir. 1981) [sending state retained responsibility for legal assistance; prisoners without counsel or a library containing sending state's law stated cause of action; burden on sending state to show adequate alternatives]; Messere v. Fair, 752 F.Supp. 48 (D.Mass. 1990) [same]; Hohman v. Hogan, 458 F.Supp. 669 (D.Vt. 1978) [assuming same, prisoner in Illinois must be provided access to Vermont courts]; Hudson v. Israel, 594 F.Supp. 664, 669 (E.D. Wisc. 1984) [same but dismissing action "against a party who had no personal involvement..."]; Blake v. Berman 625 F.Supp. 1523 (D.Mass. 1986) [sending state's corrections officials retained responsibility for assuring access to Massachusettes courts while prisoner in Kansas]; Benjamin v. Potter, 635 F.Supp. 243 (D.Virgin Islands 1986), aff'd, 838 F.2d 1205 (3rd Cir. 1988) [Virgin Islands had responsibility to prisoners transferred to mainland prisons to facilitate access to Virgin Islands courts]; Brown v. Smith, 580 F.Supp. 1576 (M.D. Pa. 1984) ["persuasive" that sending state shoulders the burden to provide state law books or counsel].

"[W]hile neither controlling nor fully measuring the Court's discretion," Supreme Court Rule 10.1, "indicates the character of reasons" the Court will consider in granting certiorari review. None of these reasons apply here. There is neither a conflict in the circuits[6], Rule 10.1(a), or with a state's highest court, Rule 10.1(b), nor an "important

[6]The decisions relied upon by petitioners are all factually distinguishable. Some appear to have little to do with the issue at hand. See Logue v. United States, 412 U.S. 521 (1973) [U.S. Marshall not liable under Federal Tort Claims Act for federal prisoner's suicide in county jail]; Black v. Wilson, 838 F.2d 470 (6th Cir. 1988) [App. 36a-41a] [unpublished; not involving interference with counsel]; Spurling v. Wigginton, 907 F.2d 151 (6thCir. 1990)

question of federal law..." Rather, we have here a fact bound, unique and contingent order without a single dissent below.

III. BY FAILING TO APPEAL OR OTHERWISE OBJECT TO THE PRELIMINARY INJUNCTION ENTERED ON JUNE 7, 1989, THE PETITIONERS HAVE FORFEITED THE RIGHT TO CHALLENGE THE UNDERLYING MERITS; AND, IN ANY EVENT, CERTAINLY SHOULD NOT BE PERMITTED TO DO SO IN THE UNITED STATES SUPREME COURT.

The imposition placed on respondent by the courts below was slight, yet this fact was ignored in the Petition. As Corrections has acknowledged, there was no appeal from the entry of the preliminary injunctions in June, 1989. That injunction required that Foster be returned to KCIW "until the completion of her appellate brief [sic] and oral arguments are heard in her appeal" [Appendix 23a]. In March, 1991, prior to oral arguments, Corrections made a motion to lift the injunction [Docket Entry 55]. No new facts were alleged. The lower court refused. The Sixth Circuit affirmed.[7]

There is a "requirement that a successive motion state new facts warranting

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[App. 42a-47a] [unpublished; not involving interference with counsel]; Stewart v. McManus, 924 F.2d 138, 1141 (8th Cir. 1991) [Kansas disciplinary rules needn't be applied in Iowa. Interstate Corrections Compact provides that "*disciplinary* authority shall be exercised by the receiving state..."]; Johnson v. Barry, 815 F.2d 1119 (7th Cir. 1987) [applying Illinois disciplinary rules to federal inmate had rational relationship to legitimate state purpose]; Cannon v. United States, 645 F.2d 1128 (D.C. Cir. 1981) [jurisdiction of Federal Tort Claims Act]; Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1979), cert. denied, 440 U.S. 980 (1980) [federal prisoner can sue when housed in county jail under contract]; Henderson v. Thrower, 497 F.2d 125 (5th Cir. 1974) [federal prisoner can sue when housed in county jail under contract].

[7]Interestingly, this claim formed the basis of petitioners' lead issue in the Sixth Circuit. Now, however, Corrections abandons this approach and focuses on the district court's subsequent order.

reconsideration of the prior decision." F.W. Kerr Chemical Company v. Crandall Associates, Inc., 815 F.2d 426, 428 (6th Cir. 1987). Corrections did not meet that requirement; they did not advance "new facts." Of course, Corrections did not appeal the portion of the lower court's order requiring that Ms. Foster remain in Kentucky until oral arguments were concluded, which they had a right to do. 28 U.S.C. Section 1292(a)(1). Certainly, that failure "would logically preclude a subsequent interlocutory appeal under Section 1292(a)(1) from an unwarranted successive motion." Id. at 429. The present case represents "an unwarranted successive motion." The Sixth Circuit agreed.

> Because the Kentucky officials did not appeal from the grant of the preliminary injunction, the general rule is that they cannot now challenge the merits of the underlying injunction. Cerro Metal Products v. Marshall, 620 F.2d 964, 972 (3rd Cir. 1980); See, Merrell-Nat'l Labs, Inc. v. Zenith Labs., Inc., 579 F.2d 786, 791 (3rd Cir. 1978). Rather, review should be confined to the propriety of refusing to vacate or modify it; the inquiry should be whether the Kentucky officials have demonstrated that changed circumstances make the continuation of the injunction inequitable. Winterland Concessions Co. v. Trela, 735 F.2d 257, 260 (7th Cir. 1984).

[Appendix, 2a-3a].

This case is in an extremely poor posture for review by this great Court.

CONCLUSION

It hardly impinges upon state decision-makers to require a modicum of rationality to support actions which directly infringe upon important constitutional rights. In this case, respondent's legal position made so much sense in 1989 that petitioners didn't even protest (motion to reconsider, appeal) when the initial relief was ordered. Requiring a receiving state to allow a death-sentenced inmate unmonitored attorney phone calls and/or

necessary law books is not a great or even significant imposition on a sending state. In any event, there is no issue presented in the certiorari petition worthy of the time of this Court, or any federal judge for that matter.

THEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gail Robinson, counsel for plaintiff, certify that the attached brief in opposition to the petition for certiorari, and motion to proceed in forma pauperis and notice of appearance were mailed to the Office of the Clerk of the United State Supreme Court and to counsel for respondent, Barbara Jones, Department of Corrections, State Office Building, Room 200, Frankfort, Kentucky 40601 on this 28th day of December, 1992 by personally depositing same in a United States mail box, first class postage prepaid. The affidavit in support of the motion to proceed in forma pauperis will be forwarded upon receipt from my client.

Gail Robinson

Gail Robinson, Esq.

Subscribed and sworn to before me, a notary public, on this 28th day of December, 1992.

Julia Lea

Notary Public
State of Kentucky at Large

My commission expires 10/30/95.